Wednesday, 10 December, 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

Third Conference

On

Procedure Regarding Summation

Before:

MAJOR GENERAL MYRON C. CRAMER,
Acting President of the Tribunal and
Member from the United States of
America,

HON. E. STUART McDOUGALL, Justice,
Member from the Dominion of Canada, and

HON. BERNARD VICTOR A. ROLING, Justice,
Member from the Kingdom of the Nether-
lands.

Reported by

Jack Greenberg
Chief Court Reporter
IMTFE

Appearances:

For the Prosecution Section

Mr. Joseph B. Keenan, Chief of Counsel
Mr. Solis Horwitz

For the Defense Section

Mr. George F. Blewett
Mr. John G. Brannon
Mr. Alfred W. Brooks
Mr. Owen Cunningham
Mr. Geroge A. Furness
Dr. Ichiro KIYOSE
Mr. Michael Levin
Mr. William Logan
Mr. MIGITA
Mr. Toshio OKAMOTO
Mr. N. SASAGAWA
Dr. Kenzo TAKAYANAGI
Dr. UZAWA
Mr. Rokuro USAMI
Mr. George Yamaoka

For the Secretariat

Mr. Edward H. Dell, Legal Adviser

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properly analyzing all the evidence, we will not be able, certainly, to have a fully completed document lodged with the Court and turned over to the accused before the completion of the rebuttal testimony. However, on such parts as we have completed and carefully edited -- that will certainly have to do with factual matters -- since they are being prepared in section, we will informally present those not to the Court but to the accuseds' counsel, particularly those who are interested in such phases. I don't want any previous answers to questions to be misconstrued to the disadvantage of the accused in that regard, and I have made it clear. If it isn't clear, I would like to answer any questions about it at this time.

MR. BROOKS: What do you have in mind with that last statement as to the delivery to the accused?

MR. KEENAN: Delivery to the accused of what?

MR. BROOKS: I understood that you are discussing the Manchurian and the China phase. I understood at the last meeting you said you had those rough drafts.

MR. KEENAN: Yes, we have, but we find it necessary to be careful of that detail, and I don't want to make any prognosis of it at this time. I am

not able to do it. We simply haven't the personnel to permit me to reliably make any definite representation. We can only state that, as soon as it is done and completed in the form that we believe will lead to no misunderstanding, we will turn it over to the defense counsel.

MR. BROOKS: I made that request for information because it would very definitely aid us if we can get that part because the first accused on our list, alphabetically, deal with the Manchurian problems; and if we can get that much completed and out of the way from a mechanical standpoint, it will prevent us from breaking down our machinery by throwing in too much at one time and not being ready when our time comes to go on.

MR. KEENAN: Of course, it must be remembered, too, Mr. President, that the accused have the advantage of a very complete statement by way of the Indictment which fully sets forth all of our claims. And, of course, they have available all of the record testimony themselves. So, I don't see how we will be providing very much by way of help in presenting these individual breakdowns earlier; but we will do it. However, we are not able to tell yet at any precise moment that we will have them completed. We can make

no further representation than to say that as soon as they are, and to our satisfaction for accuracy, they will be turned over. I cannot make a more definite statement than that.

MR. BROOKS: Mr. President, on that I would like to state that, if I have to prepare a summation on conjecture, it would be more expansive than if I know what the prosecution actually are contending and on what they are relying because I can limit myself accordingly.

MR. KEENAN: The answer to that is, we are relying on the Counts in the Indictment and the testimony.

MR. BRANNON: Mr. President, I think the defense entirely agrees with Mr. Keenan that it is a tremendous job. He has a hard task ahead of him, and we fully appreciate that. We only want it understood that we will have the opportunity to answer the prosecution argument. However that can be worked out will be acceptable to us so long as we do have that opportunity given us.

MR. KEENAN: We have no control, Mr. President, over that action. That is entirely a matter for the Court to decide. I have expressed my views on it twice, and I believe the order is reversed. I

never heard a reason given why the provisions of the Charter, that it seems to me clearly provide, have not been observed; but, rather than further delay, I have given up attempts to stop them. All we can do is to present our side of the case, which is a difficult and voluminous one, as accurately and as promptly as we can. We never yet have asked for a single day's delay in all of these proceedings, and we want to keep that record clear. But we think that when we get our document ready, realizing that it cannot be completed, of course, until all the evidence is in, we will have fully performed our duty as counsel for the prosecution.

MR. LOGAN: Mr. Keenan, is your estimate of the length of time for the delivery of the summation still about twelve days?

MR. KEENAN: It will not exceed twelve days, and I hope that will be somewhat reduced. But I find it very, very dangerous to make estimates of this nature especially when my remarks are being taken, as they should be, literally, and I do not want to make commitments that we cannot fulfill, especially those that the proprieties of the occasion do not require that we make.

MR. BRANNON: Mr. President, as I understood

the past discussions, the Court apparently indicated that it wanted the defense to have the opportunity of answering the prosecution. Otherwise, there would have been no need to reverse the procedure by putting the prosecution first. Now, if that is the heartbeat of the whole thing, I will say again that, fully appreciating the prosecutor's tremendous task, we ask only that we receive the arguments sufficiently, far enough ahead of time so that we can adequately serve the Tribunal in giving a full answer. That is our position.

MR. KEENAN: Mr. Brannon, do you mind my interrupting you for a moment?

MR. BRANNON: Please do.

MR. KEENAN: If we grant that that is the heartbeat, there certainly is logic to your position. But I am not certain, I do not know why the Court has made the ruling that it has on the Charter. It may well be that the Court itself would want to have the benefit of having a fully integrated and complete argument, summation from the prosecution upon which to weigh defensive matter as it is being urged. I can well see a reason for that. I do not, however, concede that there is a right in a case of this nature to have an argument or summation, especially one that

has to be prepared and executed at considerable length and in detail, lodged with the accused in time for them to analyze it and study it and thereafter begin a defense to it. I think that is particularly what the Charter provisions had in mind to avoid because, if that pattern is followed out, I can see a possibility of this case running into perhaps even the latter part of 1948.

MR. BRANNON: Well, there is no secret about the facts. We just seek the opportunity to answer the prosecution's charges, and I don't think it will prolong the trial. As Mr. Brooks said, our argument, if we know what the prosecution is charging, will only answer that, and probably it will eliminate many other matters that we might have to put in if we are guessing.

MR. KEENAN: By the same token, Mr. President, if the same heartbeat continued in its operation, we would then expect to have the full argument of the defense delivered and then to study that and prepare what the Charter plainly intended us to have, the right to close this case and really close it.

MR. BROOKS: I understand that that was already taken care of in the Tribunal's discussion at the last meeting.

MR. KEENAN: I am not certain that it has been taken care of in the sense that Mr. Brannon has interpreted it because we certainly haven't got down to detail of the heartbeats on it.

MR. BRANNON: In other words, you mean you want every advantage that we want?

MR. KEENAN: I want, first of all, Mr. Brannon, the Charter to be followed. Secondly, I believe that this is not the type of case where either party is entitled to have the entire summation of the other party to study and analyze and answer. I don't think it is that type of proceeding. We are familiar with shorter criminal trials which, perhaps, take as short a time as days or perhaps even weeks where one could expect the right to open and close and where you have juries. We are not interested in that. We think that what we are both entitled to and what the Court is, first of all, entitled to have from us is a complete summation from both sides. But I don't think it is one side to go first completely and another side to follow completely and then a matter of a complete analysis of the defense argument and then further detailed reply thereto; I don't think it is that type of proceeding or ever was contemplated by the Charter, and I think the Charter's provisions in

that regard were very wise. However, we are willing, of course, to accept the Court's mandate and to present our summation first. We have grave doubts if we will want to reply at all.

MR. FURNESS: Mr. Keenan, the last time you said: "There will be some things in our summation that will, I think, properly set forth our views as to liability and I think you ought to have that. I think it may shorten your arguments because, for example, our claims as to responsibility of army officers and the like, or diplomats, and what our theory is, I think you ought to have that in order that you could better prepare your defense." Then you went on to say, "And I think we could even do this: that if we don't have our summation completed even in its final form we would be very glad to get out a draft for you setting forth what our legal propositions are with respect to the various accused." Do you think now that you can do that?

MR. KEENAN: No, I think not, and I want to state the reason why not frankly. At the time I made that suggestion I was doing, at what I deemed to be an informal meeting -- exchanging ideas. I did it with the hope or the expectation that that might lead to a curtailing, a shortening of the argument

and bring this case to a conclusion. I feel that, when the accused still wants to have a limited time for argument, it discourages me to the extent that I feel now more like standing upon our strict, legal rights and premises and saying, "We'll do our job, and please, you do yours."

MR. LEVIN: I would like to take issue with Mr. Keenan's statement with respect to the point that he makes that in this type of case it is not as necessary as in other types of cases to have the summations in the hands of the other parties so that they might analyze them. It seems to me, if there ever was a case requiring that sort of thing, it is this type of case because of the vast amount of evidence, the vast amount of material, the many problems that are involved. And, in addition to that, the matter of processing of material is an important one.

MR. KEENAN: Are you finished, Mr. Levin?

MR. LEVIN: Yes.

MR. KEENAN: Mr. President, the answer to that I beg leave to point out, respectfully, to the Court and all the accused' counsel.

There has been an opening statement. There is probably an unprecedentedly long Indictment with specifications and Appendices. There has been an

opening statement made in each of the various phases as we have approached them, all of which have been in the hands of the accused a long time. In addition to that, the accused themselves had made opening statements as they approached the defense of their phases. And, I think, what is not so important are the arguments on motions to dismiss because I think they had to do with jurisdictional matters and matters that no one is going to get any particularly new views on. Yes, the motions to dismiss at the close of the prosecution's case, while it didn't set forth in detail what we expect in our summation, and while it contained some inaccuracies because we had to prepare it very quickly, still that is added information given to the accused, and I think those very things make this case come within the category of the unusual one that I claim.

MR. FURNESS: The thing on the opening statements is that for the most part they dealt with general phases and didn't deal so much with individuals.

MR. KEENAN: But what deals with the individuals will largely have to do with the evidence, and surely that is as apparent in the record for you as it is for us. And while we have the over-all task with about four or five less -- with less than four or

five men working on this, you have double the number of American counsel that we have presently in this case; and we have the job of doing the whole business, and you people can divide the job among your various accused. None of you have more than two.

MR. LOGAN: Don't you have counsel from the other nations, Mr. Keenan?

MR. KEENAN: I am including those that are working on this summation now.

MR. LOGAN: We only have twenty American counsel, and you have ten Americans and counsel from other nations.

MR. KEENAN: How many we have? We have none from New Zealand; we have one from Canada.

MR. LOGAN: Is that right?

MR. KEENAN: We have one from Australia. Those who are working on the summation are the ones I am talking about. And naturally, when you do have a summation of this type, to get together and have it consistent to a pattern, it has to be presented to a few men in the later stages. You can have a good deal of help in getting the details as to various accused, but even that has to be reviewed and checked and brought into harmony with the rest of the statement so that it doesn't permit, Mr. President, of a

great many men working on it at this stage because we have to face its preparations and completion at the end of the testimony.

MR. LOGAN: Mr. Keenan, I don't think there is anyone in this room who will take issue with the proposition that it is a tremendous task for both the prosecution and defense. We have problems the same as you have. Ours perhaps may be even greater than yours because many of us have to follow the evidence going in now as it affects our accused, spend time in court. We just can't spend it in the office. I sympathize with you because --

MR. KEENAN: I think you certainly have that difficulty, too.

MR. LOGAN: We won't know what all the evidence is -- we are in the same position -- until the document is offered and the last witness has testified.

MR. KEENAN: I think it has been notable, Mr. Logan, that there has not been very much evidence that will affect the other accused in the final presentation of the defense. There may be considerable in effect but not very much in volume: Let me put it that way.

MR. LOGAN: Still, it takes our time.

MR. BRANNON: So that I might understand

this, the purpose of the meeting today, Mr. Keenan, was that you were reversing yourself from what you said the last time and are saying that you will not be able to give us these documents.

MR. KEENAN: If that is true, and you can take that interpretation of my statement if you wish, the purpose is now that there will be no more reversals and no misunderstanding, that we will stand upon our strict, legal rights, and we will present our document when we are required to by the Court. And with that spirit of the accused, if that is the give and take, we won't do anything before that time.

MR. FURNESS: I don't think it is. As I understand you, you will do your best to comply with --

MR. KEENAN: I see the danger of attempting informally to comply and lighten the other man's burden. But then it came to a point in the tentative meeting, as I understood what it was, when we were asked again to go out and see what the mechanical difficulties were and come back and report it. I have never been afraid to reverse myself. I have been reversed many times in life by others and by myself. So, let it be your way: We are reversing our estimate. Yes, we find that it is impractical to comply with it. Therefore, we can't do it, and we

are giving you as reasonable a notice as possible.

MR. BROOKS: Mr. Keenan, on the mechanical difficulties, if it's in the processing of this, the machinery we have might be of assistance to you. We have some machinery that is not being used that might be utilized, and we would be willing to make an offer of any available machinery we have for processing documents, if that is necessary.

MR. KEENAN: Well, the processing has to do more with the processing in men's minds. The mechanical end of it is not so difficult. Thank you very much for your offer.

MR. LOGAN: May I make this statement? I still think that the position we took at the two previous meetings is the same, that it didn't make any difference whether prosecution went first and prosecution rebut or the other way around, but I submit that the Tribunal of its own volition, if it can see it our way, can take any steps that it might have in mind to afford the prosecution and defense the opportunity to present these documents and summations in a logical, scholarly manner even if more time is necessary. I think that that should be done in a case of this nature.

MR. BRANNON: Well, Mr. Keenan, please do

not misunderstand me. I am not criticizing you. I am merely stating the defense position, and I urge the Tribunal to recognize this. We want the right to answer the prosecution. A fact may be a fact, but an interpretation of that fact will vary. If the prosecution desires to interpret it one way, we may wish to argue the other interpretation. I think that is our right, and that is their burden: to proceed with the evidence, and we shall answer it. That's all we are asking.

I know these meetings are informal, and I know that what we say doesn't bind us, but that is the position of the defense, and that's the main point that we want to make: In any way that it can be worked, we will be most cooperative.

MR. KEENAN: I think, Mr. President, that the fact is so clear, that the theory of this prosecution is clearly set forth in the Indictment. I don't think that the accused have the right to wait and to learn what our interpretation of the law is, or our particular manner of putting our interpretation or contentions, and then study that and then come back in a trial of this nature. That, of course, will be for the Court to determine. But I sincerely protest that I think that is not the spirit

of this Charter. It is not the method in which a law suit of this type should be tried, and I can envisage a tremendously long delay if that were carried out.

We have an alternative. This Court can tell us to go forward and direct us, and we can; and I suppose, following the American practice, it would have the right to determine how much of our allotted time, if we had an allotted time, we could employ, we must employ, in the initial statement, or it might say to us, we want the case thoroughly covered, as it frequently has been stated in domestic trials. But the prosecution has the right to close a case. That is clearly recognized in this Charter. We are not really being given that right in this case. It doesn't mean anything because we will have to, for the purpose of the Court, as we see it, recognizing that we could make our initial statement as brief as we please; and we could save what we have for the conclusion. But that isn't the type of enterprise we are in. We are quite willing to state everything that we have at one time in as erudite a manner as we know how and lodge it with the Court for whatever assistance it has to the Court. It isn't the practice to make a summation for the assistance of the accused. That is a new concept. Our summation is for the assistance of the Court. There is a gross

misconception, I think, in that.

MR. BRANNON: No misconception. We are answering for the convenience of the Tribunal, and I think it was one of the Justices that said he would personally like to have it done that way, like to hear our answer to the charges.

MR. BROOKS: If we don't answer it, the Tribunal would have to take that job for itself and would have to go into detail and study that. And I think it would be of great assistance in answering to have the defense do that groundwork and lay what they consider is the interpretation and the correctness of the record before the Tribunal for its consideration. It would save them innumerable time, and they would be convinced that the job had been done thoroughly.

MR. HORWITZ: May I say something here about this matter for the defense? I have been working on this matter now for over the past three months. If anybody has the idea that he can start writing his summation for an individual after seeing the prosecution's, whether it be given before we deliver it or during the time or a few days before that part is delivered in court, that he can start then to prepare, then he's got a mighty bad shock coming. This case

is too big to do that.

MR. LOGAN: May I answer that right away? I don't think there is anybody in the defense who has any such idea.

MR. HORWITZ: Listening to the conversation that has been going on today, I have a very definite impression that: first we want to see what the prosecution has to say, and then we are going to decide what we have to say. Your problem is not going to be very complicated because you can anticipate a lot and prepare your draft; and then, if the prosecution hasn't said something on a point you have raised, you can cut it out. If they have said something, you can add it.

MR. LOGAN: That's the way we are all working on our summations at the present time.

MR. BRANNON: I think we are following that, Mr. Horwitz, exactly.

MR. LEVIN: I do know, Mr. Horwitz and Mr. Keenan and gentlemen, that some of the defense already have their drafts in quite complete form, and it will be completed as soon as the case is concluded.

Mr. Keenan, do I understand, in your reversal of position, that you reversed the position you stated today, that on such parts of the summation as

are completed you will place in the hands of the individual accused; that you will not do that now?

MR. KEENAN: I find this: that that is going to be the very last part of our work logically. It is going to come very close to the end. It isn't so much a reversal of my position, call it that --

MR. LEVIN: You called it that. That's why I called it that. I didn't consider it that.

MR. KEENAN: The fact that I don't want to mislead, first of all, the Court, and I don't want to mislead, with great respect, a single one of the learned counsel for the accused. I don't want them to be under any misapprehension. I know the order of our presentation, and I know that it is a dangerous thing to make a commitment because we may want to make some changes in our arrangement because we learn things as we go on. We discuss them afternoons and evenings, and we get different views, and we feel that our chief obligation is to get that completed document, Mr. Levin, to the Court.

We feel that we have no obligation under the sun to our friends on the other side of the table, none whatever, and we feel that what we try to do in the interest of brevity and of cooperation is so apt to be misunderstood and misconstrued that an

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effort to be cooperative is apt to mislead in some regard. I want to avoid it, in other words. I don't have to do it, and I feel that I might be led into making definite commitments that we couldn't fulfill in spirit as well as in letter. I would rather, therefore, make none; and I am reversing myself to that extent.

ACTING PRESIDENT: In other words, you are willing to cooperate but not willing to specify just how you will cooperate.

MR. BRANNON: Mr. President, if we sat in the courtroom and heard the prosecution make its argument, not knowing in advance what they were going to say, and we are given the privilege then to speak extemporaneously after reading our other arguments, we would be achieving the same end that arises in the American practice, but that would be a long process: the red light, the interpretation. It would be impossible to do that. We don't ask an added advantage. We will be glad to do it that way if it were humanly possible to do so, but it is not possible, and I don't think Mr. Keenan would say that it was possible for us to do that. And yet that is the advantage that defense counsel have in the United States, the only practice that I am familiar

with.

MR. KEENAN: They don't have it in New York State; they don't have it in Pennsylvania. Those are the two largest states in the union.

MR. LEVIN: They have it largely throughout the middlewest.

MR. KEENAN: I don't think this Court is too much interested in what we have in any particular country.

MR. JUSTICE ROLING: Mr. President, I would like to have some certain information of the Chief Prosecutor. When you start your argument in summation, are you then ready with your whole brief? Is that processed and delivered to the Court and to the counsel?

MR. KEENAN: That is our plan, yes, Mr. Justice.

MR. JUSTICE ROLING: So, when you begin your summation, that will take about twelve days, and at the end of those twelve days you will deliver to the Court and counsel the whole summation, or will you deliver it in pieces?

MR. KEENAN: Well, I think that is a fair question, Mr. Justice. What we want to do is to have our document entirely completed before we start to

deliver any of it. But we are working at a disadvantage because -- I don't say this to irritate anyone -- we have planned to comply with the Charter as we read it, and we have taken a good deal of time and having a good deal more detail than we would, perhaps, have otherwise. I don't know whether the Court has made an order for us yet to deliver the document processed before we start to read any of it. I would like to know whether that order is to be made. If it is, it is possible that we might have a few days interim because it stands to reason that there will be some evidence that we will -- evidence offered that we will not know whether it will be accepted by the Court or not. We are even trying to make provisions for that, to include it and delete it if not used. But it presents a serious problem for the one who has to go first to get a completed document before he starts to read any of it. I wouldn't like to bind myself on it, and we haven't yet, as I understand, been directed by the Court to deliver a full document processed before we start to read any of it.

Mr. Horwitz suggests that the mechanics of that will make it very difficult to comply with such an order, and that is an inanimate thing that doesn't have to deal with our good will.

MR. FURNESS: If you have a few days between the completion of the others and the start of the summation, will it be mechanically impossible?

MR. HORWITZ: Yes. It is not a question solely of a few days.

MR. JUSTICE McDOUGALL: If it takes twelve days to deliver it, and you had ten days intermission, then it will be bound to be ready, surely.

MR. HORWITZ: But we don't need ten days intermission. That will cause more delay. We can, however, have the first half of the document assuredly ready when we start to deliver immediately. And while that is being read, the others can be started in being prepared. The only thing is, we do not wish to commit ourselves that -- let's say we begin on January 15, and on the morning of January 15 we have everything completed. There may be mechanical delays which may require us to have four or five days extra before we get to the second part of it.

MR. JUSTICE McDOUGALL: I understand that.

MR. KEENAN: We are not asking for any interim. We have not yet, and I want to see if we can preserve our record in this long trial. It means something to us.

MR. JUSTICE McDOUGALL: We can put it this

way: that you would almost certainly have your brief or your summation or closing address fully completed and processed five days before you terminate the reading of it.

MR. HORWITZ: That, I think, could be a safe assumption.

MR. JUSTICE McDOUGALL: And at that time you would be prepared to deliver it to defense counsel, if it is all completed.

MR. HORWITZ: Parts of it will have been delivered to them beforehand.

MR. JUSTICE McDOUGALL: I am talking about the whole.

MR. HORWITZ: The latter part?

MR. JUSTICE McDOUGALL: Yes.

MR. HORWITZ: I think that could be done, yes.

MR. JUSTICE McDOUGALL: So that would give at least a week and some a great deal more. Now, in view of what Mr. Keenan said, which is eminently reasonable, and with which you all seem to agree, which is also eminently reasonable, that your closing addresses will be prepared long beforehand and only subject to supplementation or slight modification, having regard to what you read in the prosecution brief, a week would be a reasonable time in which to

permit any changes for number one and, certainly, plenty of time for the others. Is that unreasonable?

MR. BLEWETT: That seems right.

MR. JUSTICE McDOUGALL: On what Mr. Horwitz and Mr. Keenan say, we will take Mr. McManus, who is number one; he will have it at least six days before he has to address the Tribunal. And the lower you are down on the alphabet, the longer you will have it. Now, surely that will be time enough to make any modifications in your already prepared address. That is why I asked Mr. Horwitz when the last page would be processed for delivery, and that would be within a day or so.

MR. HORWITZ: That is within the latest because I hope to have it all done at one time.

MR. KEENAN: We won't make any commitments.

MR. JUSTICE McDOUGALL: I am trying to make sure that the defense will have enough without any danger of interruption.

MR. BROOKS: Mr. Justice, that would be true as to our rough draft. But, as to a processed argument in the numbers that we have to process, we would have a tremendous burden there on the machinery. It is crippled by loss of some of the efficiency of the machines from breaking down.

MR. JUSTICE McDOUGALL: By that time the prosecution, having completed their processing, could lend you some of their facilities.

MR. KELNAN: I would say, practically all of it. We would need a little something.

MR. BRANNON: How does that sound to defense counsel?

MR. BLEWETT: That sounds all right to me. I am satisfied.

MR. BRANNON: I would think, then, it would be merely a technical matter, that is, whether or not we could process within that period of time.

MR. JUSTICE McDOUGALL: Well, the processing would only amount to some changes. It wouldn't amount to a complete reading.

MR. BRANNON: It might.

MR. JUSTICE McDOUGALL: It might be the odd case. But, by and large, it wouldn't be a heavy problem because you never could. As Mr. Horwitz said, your brief or speech must be prepared long before you see the prosecution's.

MR. BRANNON: We are working on it.

MR. JUSTICE McDOUGALL: I know. And all you would have to face would be changes on it, additions, supplementations or, possibly, some deletions.

The deletions wouldn't have to be reprocessed. They could be scored out for that matter.

MR. LOGAN: I think that would apply to a majority of the defense, but there are some exceptions.

MR. JUSTICE McDOUGALL: Well, if there are any special cases, they can always be met; but we are trying to meet, from a practical point of view, the problems of both sides, and it looks to me, from what the prosecution says, that there should be no real difficulty. Exceptional cases will have to be met when they come up. And it might even mean, in some cases there will be a change in the order of the defense addresses because some might be ready and others not. That you could arrange yourselves.

MR. BRANNON: Yes, we discussed that today. That may happen.

MR. JUSTICE McDOUGALL: I don't think there would be any serious objection on the Court's part rather than just sit around doing nothing.

ACTING PRESIDENT: Does anyone else have any ideas?

MR. KEENAN: No one has suggested yet the reverse of the proposition that as soon as the entire draft of the defense is completed that it might be

turned over to the prosecution to shorten some of the things it would say. That hasn't even been considered here yet.

MR. JUSTICE McDOUGALL: It hasn't been asked for.

MR. KEENAN: I am suggesting it at this time.

MR. BROOKS: I have one now, Mr. Keenan. If you can make as much of it as I can, you might be a big help to me.

MR. KEENAN: I will say this: There have been several instances when the defense counsel have gone out of their way, especially when they have had very long documents for their accused, and turned them over long before they were required by the Court rules, and they have been very helpful to shorten the proceedings of the Court. It was very much appreciated, and I am sorry that I feel unable to make any more definite commitments than I have made. But I have responsibility under this Charter that we will perform that which I say we will do, so I think we will stand on our latter statement.

MR. JUSTICE McDOUGALL: The present understanding which, seems to be good, sound common sense, is satisfactory to all concerned.

ACTING PRESIDENT: I think the defense

counsel will be willing to cooperate along your last suggestion as much as they can.

MR. LEVIN: I am sure, Mr. President, they will. I can speak only for myself. But, if I had my draft ready, I would be only too glad to hand it to Mr. Keenan. I gave Mr. Morgan SUZUKI's statement long before -- shortly after it was processed and before it was distributed. I know others did, too.

MR. KEENAN: One final word from prosecution at this meeting. As we made an estimate of about twelve days beyond which we say we will not go and we expect to cut that down vis-a-vis that, is there any representation as to the over-all time that we might feel sure that the defense would not exceed?

MR. LOGAN: We have already stated that at the last meeting. We said thirty days. But, of course, I don't know; it is just a rough estimate.

MR. HORWITZ: Is that thirty court days or just thirty days, Mr. Logan?

MR. LOGAN: At the time I said it, I had a month in mind, but I think it may be a little over that.

MR. KEENAN: I have a suspicion, too, that this whole business will not be as voluminous as we estimated.

MR. BRANNON: I was going to say that, too. When you read the typewritten page, General, it goes much faster than ordinary speech.

MR. LOGAN: The mere fact that we have to write it out cuts it down.

MR. JUSTICE McDOUGALL: Oh, yes. Well, that seems to be --

MR. BRANNON: I think we are inclined to over-estimate rather than under-estimate.

ACTING PRESIDENT: Has anybody else anything to say?

MR. KEENAN: I want to thank you, Mr. President, for calling this meeting so that we can clear up any ambiguities and misunderstandings.

MR. JUSTICE McDOUGALL: Everything is cleared up. It seems to be quite clear.

ACTING PRESIDENT: All right.

(Whereupon, at 1650, the proceedings were concluded.)

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the anticipated argument that you are going to make?

MR. KEENAN: You can refer to anything that is in the evidence and anything that is in the statement that is given to you. That would be the purpose of giving it to you, but not for delay.

MR. LEVIN: No. I wanted to be sure that I understood what you meant when you said not to make any reply.

MR. KEENAN: What I expect from the last meeting with the Acting President, and I know he is only speaking in the moment, is a tentative agreement with himself that when we get through with the taking of this evidence that we do as in every other case: Whoever has the burden begin immediately the summation without any hiatus whatsoever; whoever has that burden, at the end of the taking of the testimony, it be understood that he gets right up and have his document prepared, whoever he is. In the meantime we will do everything we can to expedite the preparation of our document. When we do, without waiting for it to be translated, we will be glad to give a copy to everyone of the counsel.

MR. LOGAN: Mr. Keenan, as I said --

MR. KEENAN: And you can use any part of it for any reason that you want during your arguments.

MR. LOGAN: As I said at the beginning of this hearing today, to me it doesn't make any difference what the order of procedure is so long as I have an opportunity somewhere along the line to answer the prosecution's summation.

MR. JUSTICE McDOUGALL: On that point, Mr. Logan, I just want to ask a question. I understood you to say, Mr. Keenan, that the prosecution would have no objection to the defense filing briefs, as you call it.--

MR. KEENAN: Exactly.

MR. JUSTICE McDOUGALL: -- after the prosecution argument or summation to cover such points. That wouldn't necessarily be read, but that would be, as far as I am concerned, unobjectionable. In fact, I would be glad to have it because then it would give us the argument on the whole.

MR. KEENAN: We would like to have that a bi-lateral argument so that both sides would have the right to file briefs on the other's argument.

MR. LOGAN: It is your answer. If we go first, you are answering us.

MR. KEENAN: Yes, but in the event there are briefs filed, we will assume that you may have some matters -- oh, yes, it could well be that after you

get through with your summation and after we get through with our summation that you would file a brief in which something would be grossly distorted, and we wouldn't want that to occur. We would have the right to set forth our views, too. That wouldn't harm you because we will have already stated our entire case as we saw it. You will have stated yours; you will have answered any points you have to answer with us; and that would give us the right to reply in kind which everyone of you know is the prevailing rule in all your jurisdictions: the right of the one bearing the burden, in this case the prosecution, to open and close. And that is all it does, and it is eminently fair.

MR. HORWITZ: Can I point out one fact to Mr. Logan? Our summation is being prepared now and will be finished, we hope, before you have your summations prepared and delivered. Therefore, in order to answer your arguments we have to anticipate them. We really have no opportunity at any time to meet the arguments that you may raise unless we have the right to file a brief in the summation, except to anticipate arguments that we believe you will raise because, the thing is so big, we cannot wait until you deliver your arguments in order to write ours. We

have an over-all problem that has got to be done now before we hear one word that you say, so that we have the problem of anticipating your arguments even though we have the right to speak last. We really are not answering you at all. We are answering you in accordance with the way we think you are going to raise certain matters, but we are actually not answering.

MR. KEENAN: That is the reality of it.

MR. BRANNON: Why would you object to switching it around the other way then?

MR. KEENAN: I have given my reasons already.

MR. BRANNON: Mr. President, we had a meeting today, quite a number of the defense counsel, in regard to your memorandum, and I made some notes here which I might save you a lot of time if you will allow me to read because I think it represents a majority of defense opinion. Would you care to hear it?

ACTING PRESIDENT: Go ahead.

MR. BRANNON: "It is so elementary as to hardly be worthy of mention that the prosecution is charged with the burden of proving its case and going forward with the evidence. The defense is

always entitled to answer the prosecution's evidence. It likewise follows that at the time of summation or final argument it is only fair that the defense be apprised of the prosecution's contentions and how it construes the evidence that has been presented. The defense then has a chance to answer step by step not only the evidence of the prosecution but its contention of what that evidence has proven.

"Thereafter, the prosecution, because it does have the burden of proof, may rebut the defense argument to its original summations. I believe the Supreme Court of the United States of America clearly sets forth this theory for its rules of procedure and provides that the appelant who has the burden of proceeding with his appeal argue first. Nothing could be simpler or more understandable than this principle of jurisprudence that the defense need only meet the evidence and allegations of the prosecution and that they be given the right to do so. To adopt the procedure set forth in this Charter is to give the prosecution the right to present its evidence first and last, to hear the defense argument and to then answer it and go on with its explanation of what the evidence has proven.

"Such an obvious disadvantage should not be

tolerated; and, if it demands that an appeal be made to the Supreme Commander to amend the Charter, we feel it is the duty of the Tribunal to request that such steps be taken.

"As to the length of time of the arguments, defense feels there should be no restrictions. They should be trusted to confine their arguments to essential matters and to be expected to observe the necessity for saving time.

"Some general arguments will no doubt be made by the defense on behalf of all of the accused or the majority thereof. The men who make these arguments reserve the right to later make individual arguments in favor of their respective clients. To follow any other procedure would be for them to sacrifice the valuable time they possess in favor of the group as a whole.

"As to submission of arguments on briefs, the defense unanimously agrees that they should be given the unrestricted right to fully, orally argue their case and to submit briefs in support if they so desire but that under no circumstances should they be hampered in any way toward making a full oral argument."

Mr. Logan touched on the first matter.

At any rate, that is the contents of our

discussion to date, and I said I believe it represents the best majority of the defense.

MR. KEENAN: I have to say, Mr. President, in reply to that, that the proceedings in this courtroom have shown that not all of the counsel have been as time conscious as the memorandum read would indicate and that there ought to be some definite limitation placed upon the period of time to be consumed by prosecution and defense.

ACTING PRESIDENT: That is my personal opinion. I don't know how the Tribunal feels about it, but you have to put some limit on it.

Now, as near as I can figure out, the prosecution and defense aren't together on anything, are you?

MR. KEENAN: Excepting that we agree that the sensible procedure is to provide for written briefs to be filed and submitted to the Court. Do we all agree on that or is there any dissent?

MR. BRANNON: That it be mandatory or permissible?

MR. KEENAN: Permissible, within a distinctly fixed time limit.

MR. BRANNON: Which in no way restricts the oral argument.

MR. KEENAN: Well, that I would think would restrict unreasonable requests made for unlimited oral arguments, yes, because it would provide a complete answer to the contention of any man that a failure to permit him to talk weeks if he saw fit would prevent his accused from getting a fair trial. It would also answer any question about the unfairness of not permitting the defendant to give a reply.

MR. CUNNINGHAM: They handled that pretty fairly at Nuernberg. They gave them a court day each if they took it, and very few of them took their full time. Four and a half hours: that's a fair enough limitation.

MR. KEENAN: I don't think that was the limitation at Nuernberg.

MR. LEVIN: It was four hours. I read it in the record.

ACTING PRESIDENT: I would rather make it some other --

MR. LEVIN: Four hours, and each individual was allowed not to exceed twenty minutes in making a personal statement.

MR. CUNNINGHAM: Ten minutes at the end, as I understood it.

MR. LEVIN: Goering was allowed twenty

minutes.

MR. KEENAN: That is not permitted under this Charter. It provides that counsel speak for his client.

MR. CUNNINGHAM: That is a courtesy, maybe, that we don't require, but one court day each or four and a half hours seems to be an arbitrary but a reasonable time limit.

MR. KEENAN: I think it is outrageously long.

MR. CUNNINGHAM: Well, they didn't use their time. It does away with any complaint that they haven't adequte time to finish.

MR. KEENAN: But they didn't have American counsel for defense over at Nuernberg.

MR. CUNNINGHAM: That's right. And, if they did, they would have probably extended it far beyond the four and a half hours. They would have had to limit to a week instead of a day.

MR. LEVIN: I think there is one other question which Mr. Brannon may have brought out, and that was the question as to whether or not -- and I think it was the concensus of the defense counsel -- whatever time is permitted may be divided between them and Japanese counsel as they see fit. In other words,

if I want to take a portion of the argument in my case and Dr. TAKAYANAGI will take another portion in the same case, why, that would be permissible provided we do not exceed that limit. I mention that especially -- of course, in relation to myself, but particularly because it relates to Dr. TAKAYANAGI. The Court has already indicated that he would be permitted to make his legal argument which he attempted to make in connection with the motions for dismissal.

MR. KEENAN: It didn't say whether we would make it orally or by brief, did it?

MR. LEVIN: No.

MR. KEENAN: It is your suggestion that we have two counsel argue for one man?

MR. LEVIN: If they decide to do so.

MR. KEENAN: I would object to that.

MR. BRANNON: If we are allowed a set time, it would make no difference whether I talked or my Japanese counsel.

MR. KEENAN: Yes, it would. It would make a distinct difference.

MR. BRANNON: Because we would still be entitled to take all of that time.

MR. KEENAN: That is exactly what I am saying. If you give the defense an opportunity for a full day

in court, it is an unreasonable period of time. It isn't required for the discussion of the issues of this case at all, and you know that very well. I think it is very likely that you wouldn't even take a part of that time for your own man.

MR. BROOKS: But in a case like that, there will be a few instances where a certain number of us will not take a full day, and if each one of us is given a full day, we can -- the time that is saved from each man's case, just an hour or so on each man's case, could be put in for the time to be used for general arguments on law and other --

MR. KEENAN: I don't think that would work out at all. I would think it would an entirely reasonable procedure to suggest that the defense in general have the right to one argument upon the law of the case, one argument upon whether a crime has been committed by way of conspiracy as generally alleged by the prosecution, and I think that the rest of it ought to be addressed to the individual accused's case whether or not they were implicated or involved by the evidence in such crime; and I think it would be entirely proper to have, perhaps, a full day given for the discussion of the law and another day given by learned counsel who carefully

prepare themselves to claim that no crime had been committed on the facts. And then, I think, thereafter, when that is done, it becomes a simpler matter for the rest of the accused if they would confine themselves to the argument of the involvement of their own client.

MR. BROOKS: What I had in mind was, because of the variance between some of these cases, some men might only take an hour where another one would need a day or longer in an instance or two, and in such case, with the number of accused we have, that if each man was allowed a day for his accused, we would be allotted that total time for the defense and we divide it among ourselves for general arguments and individual arguments, and that's all the time we have; and whoever makes it, that is immaterial.

MR. KEENAN: That is exactly what I object to, and I think it is wrong in practice and in theory because it allows men who like to talk to have conferred upon them the right of several days. It is entirely unreasonable.

MR. BROOKS: That would be at the expense of those others --

MR. KEENAN: It is at the expense of the U. S. Government in the first instance and all of

these nations in the last and the expense of the value of these proceedings unless we get them terminated within a reasonable period of time.

ACTING PRESIDENT: That is another thing that the Tribunal has to consider. I think we have got enough now so we can, after we get the minutes of this meeting -- I am now glad that we did have a reporter here, and it is not going to be distributed until Monday -- try to get the Tribunal together on Tuesday afternoon so they will have a chance to study it; and later we can get together in another meeting with you gentlemen.

MR. LEVIN: I would like to make one further observation in reply to Mr. Keenan in respect to the suggestion I made. It would be naturally understood, if there is a division of time between counsel, that the second counsel that argued his portion of the case would not repeat anything that the first counsel said.

ACTING PRESIDENT: Yes.

MR. LEVIN: In view of the fact that the arguments would be all written and prepared, there'd be no loss of time.

MR. KEENAN: Might I make one more suggestion before we adjourn, and that is to respectfully ask the

Court to give consideration to the practice in Nuernberg where the practicalities of the case were given thought together with the rights of the various accused. Perhaps some of them might be entitled to more time than others. But would it be possible for all of the counsel for the accused to get together? You have some very able men among you who will take the burden of arguing the law once and for all and someone else arguing the major question of whether there is a conspiracy.

MR. CUNNINGHAM: Wednesday that question came up, Mr. Keenan, and you suggested one man or two. We suggest, give us a definite time and let us divide that time as we see fit in the manner in which we consider most effective. Don't you see?

MR. KEENAN: I think that's a reasonable suggestion to do it that way. It is not for us to even suggest to you.

MR. BROOKS: In other words, Mr. Keenan, if we were given a definite limit of one day per man, then among the group of us we have to agree. Otherwise we have no way. I have no way of making Mr. Brannon or Mr. Levin or anybody else, for example, agree that he will go and someone else will go and take so much time. We have to agree. If you say

each man has one day, that is for everything.

MR. KEENAN: Each man having only one day is twenty-five days.

MR. BROOKS: We may not take it.

MR. KEENAN: Well, you may, and it would lead to an utterly absurd result in this case.

MR. LEVIN: I would like to say at that point, Mr. Keenan, that I know, I am almost certain, that at least four or six of our defense counsel would not take over an hour or an hour and a half.

MR. KEENAN: Is that any reason why any other man should take any more than required for his case?

MR. CUNNINGHAM: Yes.

MR. KEENAN: Do you realise what I said? I asked you if that is any reason why any other defense counsel should take more time than is required for his case, and you said "Yes."

MR. CUNNINGHAM: But that is the reason. Everybody should take the time they require.

MR. BLAKENEY: I should like to say on this question of time that I think every one of us has tried cases which lasted for a matter of weeks, and the argument lasted for days. Now, this case lasted for years almost, and to say that four and a half hours -- what is our court day? Four and a half

hours -- is an unreasonable time to argue a case extending over that length of time and space, I think, is indefensible.

MR. JUSTICE McDOUGALL: That is what we want.

MR. BLAKENEY: Some of them can be argued in an hour, and I can name you two or three that cannot be argued in less than one day.

MR. JUSTICE McDOUGALL: That is all we need, both views.

ACTING PRESIDENT: Do I understand you correctly as asking for a day apiece? That includes your arguments on the general proposition of the law and every individual defense and everything.

MR. BROOKS: I think so.

MR. CUNNINGHAM: He suggested a day set aside for the law and a day set aside for the general proposition and to give each defendant one day individually.

MR. KEENAN: I think that is an outrageous proposition and perfectly absurd.

ACTING PRESIDENT: I just want to get that.

MR. CUNNINGHAM: I think that is a minimum requirement.

MR. BROOKS: I suggest it as a minimum.

MR. FURNESS: I would like to adopt the suggestion of the President that we have a day apiece.

MR. KEENAN: I don't think that is the suggestion of Judge Cramer. He is asking a question.

ACTING PRESIDENT: I don't know if I got your suggestion straight.

MR. FURNESS: I would make that suggestion so that it can be a matter of record.

MR. JUSTICE McDOUGALL: We will consider it.

ACTING PRESIDENT: We will see you next week.

(Whereupon, at 1730, the proceedings were concluded.)

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